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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 40

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER,

vs.

THE ASSOCIATED BROADCASTERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 2, 1940

CERTIORARI GRANTED MAY 6, 1940

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1 In United States Court of Appeals for the District of Columbia

No. 7282

THE ASSOCIATED BROADCASTERS, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

[File endorsement omitted.]

Notice of appeal from the decision of the Federal Communications Commission and statement of reasons therefor

Filed Nov. 12, 1938

I

Notice of appeal

Now comes The Associated Broadcasters, Inc., this 12th day of November 1938, and says that it is aggrieved and that its interests are adversely affected by a decision of the Federal Communications Commission rendered October 20, 1938, and ordered to be effective October 24, 1938, denying an application for the assignment of a radio station license filed by it under and pursuant to the provisions of Section 310 (b) of the Communications Act of 1934.

Wherefore, appellant gives notice of its appeal therefrom to the United States Circuit Court of Appeals for the District of Columbia, and assigns the reasons hereinafter stated.

THE ASSOCIATED BROADCASTERS, INC.,
By (S) E. STUART SPRAGUE, *Its Attorney.*

II

Reasons for appeal

Appellant is a corporation organized and existing under the laws of the State of California.

On the 8th day of August 1936, appellant filed with the Federal Communications Commission an application for assignment of its license to operate Radio Station KSFO located in San Francisco, California, and licensed by the Commission to operate upon the frequency 560 kilocycles with power of 1000 watts and unlimited hours of operation to Columbia Broadcasting System of California, Inc.

Appellant's application was filed under and pursuant to Section 310 (b) of the Communications Act of 1934 and as such is

governed by that and related parts of the Act. The application was accompanied by the lease agreement between appellant and Columbia Broadcasting System of California, Inc., which was to govern the transaction insofar as the individual parties thereto were concerned, and was also accompanied by extensive data bearing upont he value and earnings of the property, as well as other information on other subjects required in such cases by the Commission's rules and regulations.

The case was duly heard before an Examiner on issues specified by the Commission and after the submission of an Examiner's report, the filing of exceptions thereto and oral argument thereon, first before the Broadcast Division of the Commission and later before the Commission en banc, the decision appealed from was rendered by the full Commission with Commissioner Brown concurring in the result with a separate opinion.

In arriving at the decision appealed from, the Commission committed errors of law, both of substance and procedure, all of which aggrieved and adversely affected appellant and its interests.

2 III

Assignment of errors

1. The Commission erred in holding and deciding that the terms of the lease agreement between appellant and Columbia Broadcasting System of California, Inc., and particularly the following:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the event that it is necessary that applications for operating licenses and/or other applications, petitions, or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions, or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license or properties of Station KSFO."

* * * * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or

documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

* * * * * * *

"The Lessee and/or its assigns hereby irrevocably appoint the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

provide "assurance to the Lessor of license renewals for Station KSFO and assurance of possession in the Lessor of the license of said station existing at the termination of the lease," or is in any way in actual or apparent conflict with the Commission's jurisdiction over the subject matter conferred by the Communications Act of 1934.

2. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and Columbia Broadcasting System of California, Inc., "are in conflict with provisions of the Communications Act and not in the public interest."

3. The Commission erred in holding and deciding that the granting of appellant's application "under the provisions of the lease agreement of June 26, 1936, between the parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934."

4. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and Columbia Broadcasting System of California, Inc., were susceptible of the meaning attached to them or could, in view of the applicable provisions of the Communications Act of 1934, have the legal effect attributed to them in the following statement contained in the Commission's "Statement of Facts":

"Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to
3 the lessor assurance of station license renewals and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed."

5. The Commission erred in construing the provisions of the Communications Act of 1934, and particularly Sections 309 (b) (1) and 310 (b) thereof as conferring any jurisdiction upon it to pass upon the purely private or business phases of the lease agreement between appellant and the Columbia Broadcasting System of California, Inc., and to grant or deny the application in question upon its conception of those considerations and without regard to the statutory standard established by the Act.

6. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that it is admittedly at variance with a well-known and long-established rule of administrative interpretation and decision established by it in applying the same provisions of the Act in similar cases.

7. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that the result reached is admittedly in direct opposition to that reached by applying the same provisions of law to similar facts in other cases decided by it.

8. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that no point of law or fact is cited or relied upon to distinguish it from those cases in which the Commission states that an opposite result was reached by applying the same statutory provisions to "leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest."

9. The Commission erred in failing to find and report the basic or underlying facts necessary to support its ultimate finding to the effect that the granting of appellant's application "is not in the public interest."

10. The Commission erred in failing to give to its "Statement of Facts" the scope required by the issues involved and by the evidence adduced.

11. The findings and conclusions of the Commission are insufficient to support the decision rendered, do not fairly report and represent the evidence in the record, and do not set forth the basic facts from which the ultimate facts are to be deduced.

12. The Commission erred in failing to find and report the basic or underlying facts developed by the evidence and relating to each of the following subjects:

A. The history, financial condition, and performance of Station KSFO prior to the acquisition of the stock in The Associated Broadcasters, Inc., by the present owner in February 1933.

B. The history, financial condition, and performance of Station KSFO from February 1933 to June 26, 1936, the date of the lease agreement between appellant and The Associated Broadcasters, Inc.

C. The scope, character, and quality of the services now being rendered by Station KSFO.

13. The Commission erred in other particulars apparent from the record.

4 14. The Commission erred in denying applicant's application for a license.

IV

Review requested

Wherefore, the appellant prays an order reversing said decision and order of the Federal Communications Commission, and for such further relief as to this Honorable Court may seem just and proper.

THE ASSOCIATED BROADCASTER, INC.,
By (S) E. STUART SPAGUE, *Its Attorney.*

Proof of service

Service of the foregoing "Notice of Appeal from a Decision of the Federal Communications Commission and Statement of Reasons Therefor" and receipt of a full, true, and correct copy is hereby acknowledged this 12th day of November 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By (S) JOHN B. REYNOLDS.

5 Before the Federal Communications Commission, Washington, D. C.

Docket No. 4208

In the Matter of THE ASSOCIATED BROADCASTERS, INC. (KSFO), ASSIGNOR, and COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., ASSIGNEE, San Francisco, California, for consent to voluntary assignment of license to Columbia Broadcasting System of California, Inc.

Decided October 18, 1938

D. M. Patrick and Joseph H. Reams on behalf of applicant; and George B. Porter and Frank U. Fletcher on behalf of the Commission.

Statement of facts, grounds for decision, and order

By the Commission: (Brown, Commissioner, concurring in result in separate opinion.)

Preliminary statement

The Associated Broadcasters, Inc., is a corporation organized and existing under the laws of the State of California. It is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco on the frequency 560 kc., with a power output of 1000 watts and unlimited hours of operation.

Western Broadcasting Company (now incorporated as Columbia Broadcasting System of California, Inc.) is a corporation organized and existing under the laws of California.

This proceeding arose upon the joint application of The Associated Broadcasters, Inc., licensee of Station KSFO, and Western Broadcasting Company (now known as Columbia Broadcasting System of California, Inc.) (5 B–R–27) as amended, for consent to assignment of radio station license to Columbia Broadcasting System of California, Inc.

6 The Commission was unable to determine from an examination of this application, as amended, that the granting thereof would serve public interest, convenience, and necessity, or that the same might be granted within the purview of Section 310 of the Communications Act of 1934 (48 Stat. 1086), and accordingly, designated the same for a public hearing, of which due notice was given the applicant and other interested parties. Thereafter, and on December 2, 1936, in accordance with said notice, the hearing was held before an examiner, who, on April 6, 1937, submitted his report (I–399) recommending that the application be denied.

Exceptions to the Examiner's Report were filed and a request made for oral argument by Associated Broadcasters, Inc., Columbia Broadcasting System of California, Inc., and Columbia Broadcasting System, Inc. Oral argument was had before the Broadcast Division July 1, 1937, and again, before the Commission en banc, January 14, 1938.

The exceptions raise no questions not considered in a determination of this application upon its merits.

Statement of facts

The original cost of all equipment including antenna system, transmitting apparatus, and studio equipment of Station KSFO is $35,224.26. The transmitter and antenna are twelve or thirteen years old. The speech input equipment is six years old. The studio equipment was acquired in 1932. The present cost of equivalent equipment is $38,865.09. Depreciation of $8,733.13

was subtracted from the present cost of equivalent equipment, leaving a depreciated value of the property at $30,131.96.

Station KSFO is now and has been operating as an independent station, though the licensee at one time exchanged programs in an experimental hook-up with KNX, Los Angeles, this arrangement being continued over a period of several months. Program schedules of KSFO of recent date show diversified headings, methods of production, and commercial sponsorship.

Net profit for the period of January 1 to June 30, 1936, is $867.65. The owner of the capital stock of licensee corporation drew $1,000.00 a month as salary from the station during the period of the statement submitted. Subsequent to June 30, 1936, the business showed an increase in profits of $1,000.00 to $1,500.00 per month.

Columbia Broadcasting System of California, Inc., is a subsidiary of Columbia Broadcasting System, Inc., of New York. None of the officers or directors of this corporation is an alien; and not more than one-fifth of the capital stock of said corporation is owned of record or voted by aliens or their representatives.

The assets of Western Broadcasting Company (now Columbia Broadcasting System of California) as of June 30, 1936, totalled $449,861.34. The net worth of that company as of that date was $301,808.20. The total assets of the Columbia Broadcasting System, Inc., and subsidiary companies, as of July 25, 1936, was $10,748,331.29, and its net worth was $7,411,573.66. No new stock issue is contemplated. The transferee is qualified financially to continue the operation of Station KSFO.

7

In 1928 the Columbia System was a relatively small network of 16 stations on the eastern seaboard with some few outlets in the middle west, but in nowise a coast-to-coast project. In order to extend the service of the network, arrangements were made with the Don Lee Broadcasting Company, which then operated three stations in California. The Don Lee organization has since acted as Columbia's West Coast representative, but this association is being terminated. As a matter of policy, the Columbia System is undertaking to do more and more of the detail work connected with the maintenance and operation of its West Coast stations. The geographical separation between the East and West Coasts, the difference in time zones, special requirements of advertisers in the centers of industry and population on the West Coast, and unique opportunities to obtain talent, particularly from the moving-picture industry at Los Angeles, make it desirable to the Columbia System to have a West Coast organization.

The following stations are either owned or operated by Columbia Broadcasting System, Inc., directly, or through the agency of subsidiaries:

Call letters	Address	Frequency	Power
WABC-WBOQ	New York, N. Y	860	50 kw.
WJSV	Washington, D. C	1460	10 kw.
WBT	Charlotte, N. C	1080	50 kw.
WKRC	Cincinnati, Ohio	550	1 kw., 5 kw.-LS.
KMOX	St. Louis, Missouri	1090	50 kw.
WBBM	Chicago, Ill	770	50 kw.
WCCO	Minneapolis, Minn	810	50 kw.
KNX	Los Angeles, Calif	1050	50 kw.

Station WEEI (590 kc., 1 kw.), Boston, Massachusetts, is operated by the same interests under a lease agreement.

Columbia Broadcasting System, Inc., plans to acquire the licenses of all stations operated through the instrumentality of its subsidiaries and that plan would include Station KSFO. Proposed plans include organization of and arranging for the establishment of offices in California with various departments which go to make up the service part of the broadcast network including sales, production, engineering, sales promotion, artists, and publicity. Additional physical facilities and personnel necessary to organize and broadcast products of a high standard over radio Station KSFO would be provided. The transferee is technically qualified to continue the operation of Station KSFO.

The transferee proposes to increase the basic rates of Station KSFO from $150 to $325 an hour. Based upon this increase in basic rates, estimates of the earning ability and possibilities of the station as a network unit were given as follows:

8	Estimated gross revenue	$280,000 per year.
	Expenses, including rent and depreciation on a new transmitter	$250,000.
	Estimated net income	$30,000 per year.

Further plans of the assignee, Columbia Broadcasting System of California, Inc., include putting in new equipment (the present transmitter is to be used as an emergency auxiliary transmitter), changing the site of the present transmitter, and establishing studio and office facilities for not only local headquarters but also Columbia headquarters. The present studio is to be used for a while, depending on where larger studios will be located. In other words, they plan to "revitalize the entire plant by putting in new equipment and everything that goes with it at a new location."

At the present time Station KFRC is carrying the programs of the Columbia Broadcasting System. The plan of the Columbia System is that Station KSFO will displace KFRC, and KSFO

will be the only station carrying Columbia programs in San Francisco. The Columbia System proposes to broadcast approximately 1,650 hours a year of chain commercial programs and about 500 hours a year of local broadcasts.

Mr. W. I. Dumm, President of Associated Broadcasters, Inc., first interviewed officials of the Columbia Broadcasting System, Inc., in 1935, with the suggestion that Station KSFO be placed upon the Columbia Network and that the station be leased to Columbia. This original suggestion led to further negotiations between the parties which ultimately resulted in the execution of a lease-agreement. The agreement is dated June 26, 1936. The parties have made the agreement and an executed assignment of the station license a part of this record. The documents are required by the Rules and Regulations of the Commission to be filed with applications seeking authorization for the transfer of a station license. It is incumbent upon the Commission that it examine the lease-agreement and determine whether the provisions therein are fully within the Communications Act and not contrary to the public interest.

The expiration date of the agreement is fixed as January 1, 1942, subject, however, to the right of the lessee to successive renewals thereof for a period of five years each; the last renewal period not to extend beyond January 1, 1952.

The agreement contains a number of provisions pertaining to the equipment and other properties of the station. These provisions merely protect the property rights of the lessor and need not here be further considered. The agreement also contains provisions relating to the license renewals of the station and the future disposition thereof, and such provisions must be carefully scrutinized for the reasons heretofore stated. The provisions of the lease-agreement referred to are as follows:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the
9 event that is necessary that applications for operating licenses and/or other applications, petitions, or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions, or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license or properties of Station KSFO."

* * * * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

This agreement also contains a provision setting forth many contingencies upon which the lessor may reenter and take possession of the leased property without legal process and without being guilty of trespass. Thereupon, the provision mentioned continues as follows:

"The Lessee and/or its assigns hereby irrevocably appoints the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

The foregoing shows: (1) that, although the lessor proposes to assign its license, it claims and reserves the right to employ counsel and to enter into any action or proceeding involving the license to operate Station KSFO; (2) that the lessor binds the lessee to make "application for reassignment to the lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease"; and (3) that in case of default in the performance of the contract by the lessee the lessor may under power of attorney embodied in the contract, acting in the name of the lessee, assign to itself (the lessor) "all licenses, permits, and other assignable contracts relating to KSFO."

More specifically, the above lease provisions represent: (1) that the lessor is to be protected in the issuance of station license renewals during the period of the agreement; and (2) that the lessor is assured the possession of station license existing at the time the lease terminates.

10 The Communications Act of 1934 provides that a "station license shall not vest in the licensee any right * * * in the use of the frequencies designated in the license beyond the term thereof, nor in any other manner than authorized therein." (Section 309 (b) (1).)

A broadcast station license is issued for a term of six months. The license is a personal privilege and not transferable without the consent of this Commission. The licensee has a continuing right to apply at proper times for successive renewals of his license. (Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, 113.) In the present case, should the license for Station KSFO issue to the proposed assignee the assignor

could have no continuing right in applying for renewals of said station license; nor could the assignor have any right in the station license existing at the time of the expiration of the lease. To recognize such a right in the assignor would be tantamount to the recognition of an outsider to the use of a frequency at a future time.

Furthermore, the assignee of a station license operating under a lease-agreement, which contains provisions reserving to the lessor assurance of station license renewals, and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public, or cease to operate the station licensed.

Prior to the enactment of the Communications Act, the Federal Radio Commission authorized the M. A. Leese Radio Corporation to assign its license for radio Station WMAL to the National Broadcasting Company, Inc. At the time of assignment of the station license the National Broadcasting Company, Inc., executed a lease-agreement with the owners of Station WMAL, which contains provisions assuring the lessor of license renewals and possession of the license that exists at the time the lease terminates. These provisions are similar to the provisions contained in the lease-agreement between the parties herein.

The Federal Communications Commission on April 20, 1938, in a per curiam opinion relating to the transfer of stock of the M. A. Leese Radio Corporation to The Evening Star Newspaper Company, stated its position as to the above provisions of the lease arrangement between the M. A. Leese Radio Corporation and the National Broadcasting Company as follows:

"And it appearing that the transfer of control of M. A. Leese Radio Corporation does not directly involve a transfer of a station license, the frequencies authorized to be used by the licensee, or the rights therein granted, for the reason that M. A. Leese
11 Radio Corporation does not have any such rights to transfer, having heretofore assigned the license of Station WMAL, including the frequencies and all the rights therein granted, to the National Broadcasting Company; and that since said transfer this Commission has granted renewals of said license,

no reasons for failure to renew having been made to appear, to the National Broadcasting Company;

"And it appearing that upon the expiration of the lease between said M. A. Leese Radio Corporation and the National Broadcasting Company, Inc., neither the license nor any rights therein will revert to the M. A. Leese Radio Corporation or its assignees, or The Evening Star Newspaper Company as a stockholder therein;

"And it appearing that the assignment of license from the said M. A. Leese Radio Corporation to National Broadcasting Company pursuant to the lease agreement did not, could not, and does not operate as approval of or consent to the terms of said agreement as such, nor is it in any wise an acceptance or recognition of any rights, equities, or priorities of the M. A. Leese Radio Corporation, or its assignees, or any of the stockholders thereof so far as the license of broadcast Station WMAL is concerned;"

This Commission now finds that lease provisions assuring the lessor of renewals of license, and/or assuring the lessor of the possession of the station license existing at the termination of the lease, are contrary to the Communications Act and are not in the public interest.

This Commission and its predecessor (Federal Radio Commission), previous to this decision, has granted (without written opinion) authority for the assignment of licenses based on leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest. In approving these assignments the Commission accepted the lessee as one stepping into the shoes of the lessor with the same privileges and responsibilities; and it was the opinion of the Commission that its approval of an assignment did not carry with it approval of the provisions of the lease beyond the mere transfer of the license. Experience has shown, however, that this construction may mislead the public in general, as well as the parties to the lease agreements.

In the case of M. A. Leese Radio Corporation, supra, this Commission without the lessee before it, gave notice that no station license privileges would be recognized in the "M. A. Leese Radio Corporation, or its assigns, or any of the stockholders thereof." This was tantamount to saying that provisions in the lease under which the National Broadcasting Company operates Station WMAL, assuring the lessor of station license renewals and the possession of the station license existing at the time the lease terminates, could not and would not be binding upon the Commission. If any action of this Commission or action of its predecessor, the Federal Radio Commission, in granting an assign-

ment of a station license, may be construed as an approval
12 of lease provisions, assuring the lessor of station license renewals and/or the possession of the license existing at the termination of the lease, then to that extent said actions are hereby overruled.

Grounds for decision

On the record in this case the Commission finds:

1. The provisions of the lease-agreement between the applicants herein, providing assurance to the lessor of license renewals for Station KSFO and assurance of possession in the lessor of the license of said station existing at the termination of the lease, are in conflict with provisions of the Communications Act and not in the public interest;

2. A grant of the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO under the provisions of the lease-agreement of June 26, 1936, between said parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934;

3. The proposed transferee is legally, financially, and otherwise qualified as a licensee of Station KSFO but the provisions of the lease-agreement under which it would operate said station, assuring the transferor license renewals and the possession of the existing station license at the termination of the lease precludes the finding that the assignment of the license would serve public interest, convenience, and necessity.

4. A grant of the joint application of The Associated Broadcasters, Inc., and the Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO is not in the public interest.

Order

Upon consideration of the entire record, it is ordered:

That the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to voluntary assignment of license of Station KSFO to Columbia Broadcasting System of California, Inc. (Docket No. 4208), be, and it is hereby, denied.

This Order shall become effective at 3:00 a. m., E. S. T. on the 24th day of October 1938.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary.*

Date released: October 20, 1938.

BROWN, Commissioner, concurring.

I concur with the result reached by the majority of the Commission in this case, but I cannot subscribe to the reasons advanced by them for denial of the application.

The majority have advanced for the first time the opinion that a contract of lease, which binds the lessee to make application for reassignment of the license to the lessor upon the expiration of the lease, is "contrary to the Communications Act and not in the public interest."

Section 301 of the Act provides:

"* * * No person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * *, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

In making application to this Commission for a license, an applicant has the burden of showing that he has possession of and the right, without restriction, to use or operate certain described apparatus for the period of the license applied for. The license period is fixed at six months by regulation and this Commission may not grant a license for a period in excess of three years (Section 307 (d)). Ownership of equipment is not required. It is sufficient if an applicant shows that he is in possession of certain equipment by virtue of a lease, sale or other arrangement and that he will be in possession of such equipment during the term of the license. This, certainly, the applicant in this case had demonstrated.

Sections 301 and 309 (b) (1) prevent the assertion by a licensee of any right in the license beyond its terms. The holding of a license may not vest in the licensee any right to operate the station or any right to the use of the frequencies designated beyond the terms and conditions of such license. And Section 310 (b) prevents the transfer of a license without Commission consent in writing. The parties in this case have agreed to make application for reassignment of the license to the lessor upon termination of the lease. In one sense they have attempted to determine the right to use the frequency as between themselves. But certainly this assertion would have no effect upon the power of the Commission. As to this Commission and its powers and duties under the Communications Act, the provision must be simply a nullity.

I am unable to see how the granting of consent to the assignment of license as proposed could possibly be construed as an approval of a thing which the law (Sections 301 and 309) specifi-

cally negatives. Even if it be assumed that the parties have asserted a right as against the Commission, we cannot by our action repeal the express provisions of the statute.

Moreover, Sections 303, 308, 309, 312, and others of the Communications Act confer upon this Commission broad regulatory
14 powers with respect to the original issuance or subsequent modification, revocation, or renewal of licenses. These broad powers are specific and they recognize that in the interest of the public the Commission may at any time, upon sufficient reason being shown, modify, revoke, or refuse a license. Again, we may not by our action repeal these provisions of the statute.

Section 310 (b) of the Federal Communications Act of 1934, governs the transfer of licenses:

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned*, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing." [Italics supplied.]

The public interest, therefore, is the standard we must apply in this case. I fail to follow the reasoning of the majority that the reversionary provision in the lease is per se contrary to the public interest. It is difficult to see how the public in this case would be harmed by the fact that the proposed assignee would operate his station with equipment leased rather than purchased. The public is interested in the continued operation of the station and the continued improvement of its technical service and programs, but unless such are jeopardized by some provision of the instrument of conveyance, the exact form whether lease, sale or gift, is unimportant. Where a fact appearing in the record has no reasonable or proximate effect upon the programs or service of the station, the public interest is not concerned.

There are aspects of this case other than those assigned by the majority because of which I concur in the denial of the application. The sole test is whether the granting of the instant application would serve the public interest. From the record, I am unable to find that any benefit whatever would be derived by the public if this application be granted. The public will have the benefit of the present programs carried by Station KSFO, and in addition, will not be denied Columbia Broadcasting System's programs, which are now being carried by Station KFRC. I am, therefore, content in this case to ground my decision upon the

fact that the applicant has failed to show sufficient reasons in the public interest to warrant the granting of this application.

15 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Motion to dismiss

Filed Dec. 14, 1938

Now comes the appellee in the above-entitled cause and respectfully moves the court to dismiss this appeal on the ground that this court is without jurisdiction to entertain the same.

Wherefore, the Federal Communications Commission prays that this court enter its order dismissing this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

16 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement and brief in support of appellee's motion to dismiss

Filed Dec. 14, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

Statement of decision appealed from

The Associated Broadcasters, Inc. (the appellant herein) is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. On August 8, 1936, appellant and the Columbia Broadcasting System of California,

Inc., filed their joint application with the Federal Communications Commission seeking its "consent in writing," pursuant to Section 310 (b)[1] of the Communications Act of 1934 for the voluntary assignment of the radio station license held by the appellant for its Station KSFO to the Columbia Broadcasting System of California, Inc. The application was duly heard and on October 18, 1938, the Commission entered its Order, effective October 24, 1938, denying said application.

Ground for motion

The ground for this motion is that this court has no jurisdiction to entertain the proposed appeal for the reason that it is
17 based upon an Order of the Federal Communications Commission from which no appeal is provided under Section 402 (b) of the Communications Act of 1934.

Argument

I

The right of appeal from any decision of the Commission to this court is purely statutory and the terms of the statute must be strictly followed.

This court has consistently held that the right of appeal from a Commission decision is purely statutory and that the terms of the statute must be strictly followed. Pittsburgh Radio Supply House v. Federal Communications Commission, 98 F. (2d) 303 (1938); Pote (Station WLOE) v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933) cert. denied 290 U. S. 680 (1933), "The right of appeal being a statutory one, the Court cannot dispense with its express provisions, even to the extent of doing equity." Universal Service Wireless, Inc. v. Federal Radio Commission, 59 App. D. C. 319, 41 F. (2d) 113 (1930) and cases cited.

II

Section 402 (b) of the Communications Act of 1934 does not provide for a review of an order of the Commission denying an application for the assignment of a radio station license.

[1] "Sec. 310 (b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing" (48 Stat. 1086).

Section 402 (b) of the Communications Act of 1934 provides as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission" (50 Stat. 197).

18 On June 19, 1933, this court in the case of William S. Pote (Station WLOE) v. Federal Radio Commission, supra, dismissed an appeal based upon an Order of the Federal Radio Commission denying an application for the involuntary assignment of a radio station license. Pote based his right of appeal to this court on Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844).[2] The provisions of Section 402 (b) of the Communications Act of 1934, so far as an appeal to this court from an order of the Federal Communications Commission denying the transfer or assignment of a radio station license is concerned, are not different in any way from the provisions of Section 16 of the Radio Act of 1927, as amended July 1, 1930, with respect to an appeal from a similar order of the Federal Radio Commission. Therefore, this court's language in its decision dismissing the Pote appeal becomes fully applicable to the case at bar. The pertinent passages of the decision follow:

"On February 9, 1932, the Commission filed in this court a motion to dismiss the appeal upon the ground that a right of appeal in such case is not granted by Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844), which provides for appeals from the Commission to this court. Action on this motion was deferred by the court until consideration of the case in its order.

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[2] Section 16 of the Act of July 1, 1930, reads as follows:

"SEC. 16. (a) An appeal may be taken in the manner hereinafter provided from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission.

"(2) By any licensee whose license is revoked, modified, or suspended by the Commission.

"(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission, granting or refusing any such application or by any decision of the Commission, revoking, modifying, or suspending an existing station license * * *" (46 Stat. 844).

19 "In our opinion the motion of the Commission to dismiss the appeal should be sustained. Section 12 of the Radio Act of 1927 (44 Stat. 1162) provides in part:

"* * * The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.' * * * [The Court here quoted Sec. 16 set forth above.]

"It thus appears that no provision for an appeal from a refusal to permit an assignment of a broadcasting license is included either specifically or impliedly within the controlling section above quoted. * * *"

Since the dismissal of the Pote case this court has heard no appeal based upon an order of either the Federal Radio Commission or the Federal Communications Commission denying an application for the assignment of a radio station license.

Moreover, the appeal section (402 (b)) of the Communications Act of 1934 was enacted subsequent to this court's decision in the Pote case and Congress did not see fit to extend the right of appeal from an order of the Commission denying an application for assignment of a radio station license.

For the foregoing reasons it is respectfully submitted that the court lacks jurisdiction to entertain the appeal herein and, accordingly, it should be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

20 *Notice*

To Mr. E. STUART SPRAGUE, *Attorney for the Appellant:*

Please take notice that the foregoing Motion to Dismiss your Appeal, Statement of Decision Appealed From, and Grounds for Motion, has been filed this day.

WILLIAM J. DEMPSEY,
William J. Dempsey,
Acting General Counsel,
Federal Communications Commission.

Acknowledgment of service

Service of a true copy of the foregoing Motion to Dismiss, Statement of Decision Appealed From, and Grounds for Motion is hereby acknowledged, and a copy thereof received this 14th day of December 1938.

E. STUART SPRAGUE,
Counsel for Appellant.
By D. M. PATRICK.

21 [File endorsement omitted.]

22 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Opposition to motion to dismiss

Filed Dec. 17, 1938

Now comes the appellant in the above-entitled cause and opposes the granting of the "Motion to Dismiss" filed by the Federal Communications Commission on December 14, 1938, upon the grounds and for the reasons set out in its "Points and Authorities" submitted herewith.

(Sgd.) STUART SPRAGUE,
Attorney for Appellant,
The Associated Broadcasters, Inc.

23 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Points and authorities in opposition to motion to dismiss

Filed Dec. 17, 1938

1. An application such as that filed by appellant and denied by the Commission's order of October 18, 1938 (effective October 24, 1938), is in legal effect and in fact an application for a radio station license within the meaning of Section 402 (b) of the Communications Act of 1934, regardless of the name or title attached by the Commission to the application form or to the proceeding.

See Sections 310 (b) and 402 (b) of the Communications Act of 1934.

2. There is nothing in Section 310 (b) or elsewhere in the Communications Act which requires that "joint application" be made to the Commission by the applicant and by one who holds the license in cases of this character. The application form used and the procedure employed before the Commission as a convenience to it in "securing full information" pursuant to the mandate of the statute cannot be held to be determinative as to the inherent nature of the proceeding or the right of an applicant in such proceeding to secure a judicial review of the decision rendered by the Commission.

Goss vs. F. R. C., 62 Appeals D. C. 301, 67 F. (2d) 507.

Pacific Development Radio Company vs. F. R. C. 60 App. D. C. 378, 55 F. (2d) 540.

3. The right of a licensee of an existing station to make application to the Commission for a transfer of the license is in all respects of the same origin, dignity, and validity as the right to make application to the Commission for a license for a new station, and the standard which must control the Commission's determination in both cases is necessarily the same. The appellant licensee is a person aggrieved and whose interests are adversely affected by the decision of the Commission refusing such application.

24 Don Lee Broadcasting System vs. F. C. C., 76 F. (2d) 998, 1000.

Compare Sections 310 (b), 309, and 319 and see Section 402 (b) (2) of the Communications Act of 1934.

4. To hold that decisions of the Commission on applications arising under Section 310 (b) are not subject to judicial review under Section 402 (b) and that decisions on applications of a similar nature arising under Sections 309 and 319 are subject to such review requires doing violence to the language as well as the purpose of Section 402 (b). The literal words of a statute are to be read in the light of the purpose of the statute taken as a whole and a literal meaning should not be followed where it appears that such an interpretation would, in view of the purpose of the statute, lead to an absurd or unjust result.

Saginaw Broadcasting Company vs. F. C. C., 96 F. (2d) 544, 588, and cases cited, Goss vs. F. R. C., supra, Pacific Development Radio Company vs. F. R. C., supra.

5. Statements in the opinions of this Court to the effect that the right of appeal from a Commission decision is purely statutory and that compliance with the provisions of such a statute cannot be dispensed with even to the extent of doing equity must be interpreted in the light of the question then decided and not as

authority for a proposition at variance with other and recognized rules of interpretation and construction. There is nothing in the cases of Pittsburgh Radio Supply House vs. F. C. C., 98 F. (2d) 303 and Universal Service Wireless, Inc., vs. F. R. C., 59 App. D. C. 319, which compels or, when properly understood, even suggests the necessity for sustaining the Motion to Dismiss the present appeal.

6. In the case of Pote vs. F. R. C., 62 App. D. C. 303, 67 F. (2d) 509, relied upon by the Commission is distinguishable from the present case in that it arose under Section 12 of the Radio Act of 1927, which did not clearly state, as does Section 310 (b) of the Communications Act, that the Commission was authorized and directed to make the same type of inquiry and determination in all cases where application is made for a license whether the same be for a new license or for a license then outstanding. In fact,

there is language in the majority opinion which indicates
25 that Section 12 of the Radio Act of 1927 was considered

merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable act and which could and should be enforced administratively rather than as measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi judicial process, as is clearly the case with Section 310 (b).

7. The case of Pote vs. F. R. C., supra, cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved, in view of the fact that in other cases appeals were entertained involving applications for a construction permit where such type of application was specified in the Act itself and where the section of the Act authorizing appeals in certain cases did not specifically mention appeals from Commission decisions on this type of application. In those cases, the purpose and legal effect of the statute and the application in question rather than the literal words employed were determined to be controlling.

Pacific Development Radio Company vs. F. R. C., supra.

Goss vs. F. R. C., supra.

8. Congress clearly intended that Commission decisions in cases arising under Section 310 (b) should not be immune to judicial review regardless of the result reached and the basis therefor. A refusal to entertain jurisdiction in the present appeal by attaching importance only to the literal words of the statute rather than to its purpose would require appellant and others similarly situated to proceed first under Section 402 (a) with an ultimate appeal to this Court from the judgment of the District Court. Such procedure would seem to be not only undesirable, but unnecessary in

view of the basic similarity in the nature of the proceeding wherever the same is instituted.

Red River Broadcasting Company vs. F. C. C., 98 F. (2d) 282.

F. R. C. vs. Nelson Brothers Company, 289 U. S. 266, 277.

Respectfully submitted.

(Sgd.) STUART SPRAGUE,
Attorney for The Associated Broadcasters, Inc.,
Appellant.

26 STATE OF NEW YORK,
County of New York, ss:

Stuart Sprague, being first duly sworn, deposes and says that he is the attorney for The Associated Broadcasters, Inc., herein; that he has today forwarded by registered mail, postpaid, a true and correct copy of the attached opposition to motion to dismiss appeal to the Federal Communications Commission.

STUART SPRAGUE.

Subscribed and sworn to before me this 16th day of December 1938.

MAY E. BERNHARDT,
Notary Public,
Kings Co. No. 87; Reg. No. 209.

27 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Appellee's reply to appellant's "opposition to motion to dismiss and request for oral argument thereon"

Filed Dec. 19, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

I

Appellant, The Associated Broadcasters, Inc., on December 17, 1938, filed "Points and Authorities" in support of its opposition to Commission's Motion to Dismiss. On December 16, 1938, an identical memorandum was submitted by Appellant, Columbia Broadcasting System of California, Inc., in support of its opposition to Commission's Motion to Dismiss. In Appellants' "Points and Authorities" the argument is made that an application for an

assignment of license under Section 310 (b) of the Communications Act is "in legal substance and in fact" an application for a radio station license within the meaning of Section 402 (b) of the Act. Appellants make the amazing statement that the Pote case "cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved," and rely upon the case of Goss v. Federal Radio Commission, 62 App. D. C. 301; 67 Fed. (2d) 507, for the argument that the literal meaning of the statute should not be followed to deprive them of an appeal to this Court in the instant case. They seemingly overlook the fact that the Goss case, supra, was decided by this Court on the same day as it decided the Pote case.

In the Goss case, this Court held that an application for a construction permit was, in substance and effect, an application for a station license, and allowed an appeal to lie to this Court under Section 16 of the Radio Act of 1927 from the denial of such an application. But in the Pote case, decided on the same day,
28 this Court refused to entertain an appeal from an order of the Commission denying an application for a transfer of license and, although the argument was made that such an application was in effect an application for a station license (see dissenting opinion of Justice Groner), this Court dismissed the appeal for want of jurisdiction. After the decisions of this Court in the Goss and Pote cases, the Communications Act of 1934 was passed. Congress added to the appeal provisions of the statute language specifically granting an appeal to this Court from a denial of a construction permit, but omitted from the 1934 Act, as it had omitted from previous statutes, any provision for an appeal to this Court from a denial of an application for a transfer of license.

The enactment in 1934 of Section 402 (b) of the Communications Act, without providing for an appeal to this Court from an order denying a transfer or assignment of license, in the face of the decision in the Pote case in 1933, was equivalent to an affirmative declaration by Congress that it did not intend to provide the same type of appeal from a denial of an application for an assignment or transfer of license as it provided for an appeal from a denial of a station license.

II

Appellants further argue that the Communications Act of 1934 contemplates an appeal from an order denying an application for transfer of license because, under Section 310 (b) of that Act, such an application is treated in a judicial or quasi-judicial manner in contrast with the manner of treatment of such applications

under Section 12 of the Radio Act of 1927, which applicant characterizes "merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable Act and which could and should be enforced administratively rather than as a measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi-judicial process, as is clearly the case with Section 310 (b)." It is difficult to see any relationship whatsoever between the manner prescribed in the statute for handling applications for transfer of license before the Commission, and the question of whether Section 402 (b) permits a special review by this Court of Commission action on such applications. However, assuming arguendo that some such relationship may exist, a comparison of Section 309 (a) and Section
29 310 (b) of the Communications Act of 1934 reveals that whereas Section 309 (a) provides in substance that no application for station license or for the renewal or modification of a station license can be denied without a hearing, Section 310 (b) prohibits a transfer or assignment of license "unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing," and makes no requirement whatsoever that an applicant for such a transfer be given a hearing in any case.

Thus, a comparison of the two sections demonstrates that Congress did not intend that the Commission should adopt the same administrative procedure in passing upon an application for a transfer or assignment of license as Congress prescribed for passing upon applications for station licenses. The holding of a hearing in the instant case as a means of "securing full information" was not required by the statute but was wholly discretionary with the Commission. Obviously, there is no merit in the appellants' contention that an appeal lies to this Court merely because the procedure followed by the Commission in this case coincided with the procedure provided by the statute for other types of cases.

The difference in the Commission procedure and judicial review which Congress provided for applications for new license from that provided for applications for approval of transfer of license is undoubtedly explained by the fundamental difference between the two types of applications. In the usual case, an application under Section 310 (b) for approval of an assignment for transfer of license is made to the Commission after the proposed assignee or transferee has successfully negotiated with the holder of a station license for the voluntary assignment or transfer of the license, and he comes jointly with such licensee to request Commission approval of the transaction. This is quite different

from the situation where one applies to the Commission for the facilities held by another without the consent of the existing licensee (see Federal Radio Commission v. Nelson Bros. Co., 289 U. S. 266). In the latter case, which is in fact an application for a station license, it is incumbent upon the applicant to show that the public interest, convenience, and necessity would be served by the granting of such facilities to him rather than by permitting them to remain in the hands of the existing licensee, and presents an essentially different situation from the one in which the applicant has obtained the agreement of the existing licensee to transfer or assign the facilities.

III

Appellants' last argument is based upon an entirely erroneous construction of the provisions of the Act of October 22, 1913. Any appeal taken under the provisions of that statute for the purpose of suspending, restraining the enforcement, operation or execution of, or to set aside in whole or in part any order made by the Commission must be heard and determined by a statutory three-judge District court with a direct appeal to the Supreme Court of the United States. Appellants apparently overlooked that, except in those few types of cases specifically mentioned in Section 402 (b) of the Communications Act of 1934, all other types of cases are reviewed not by this Court but by a three-judge statutory court under the provisions of the Act of October 22, 1913. Appellants' argument, therefore, that a dismissal of this case would result in an undesirable preliminary step consisting of the resort to a District court to be followed by an appeal to this court is wholly without basis.

The Commission has no objection to oral argument in this case.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

W. H. BAUER,
William H. Bauer,
Assistant Counsel.

ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of a true copy of the foregoing Appellee's Reply to Appellant's "Opposition to Motion to Dismiss and Request for

Oral Argument Thereon" is hereby acknowledged and a copy thereof received this — day of December 1938.

E. STUART SPRAGUE,
Counsel for Appellant.
By D. M. PATRICK.

32 [File endorsement omitted.]

33 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order setting motion to dismiss for argument

February 4, 1939

On consideration of the motion to dismiss filed herein, it is ordered by the Court that the motion be, and it is hereby, assigned for argument on the March Calendar.

34 In United States Court of Appeals for the District of Columbia

No. 7282

THE ASSOCIATED BROADCASTERS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 7283

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeals from the Federal Communications Commission

Decided November 29, 1939

E. Stuart Sprague, of New York City, for appellant in No. 7282. D. M. Patrick, of Washington, D. C., for appellant in No. 7283. William J. Dempsey, Acting General Counsel, Wm. H. Bauer, Acting Assistant General Counsel, Andrew G. Haley, and William

C. Koplovitz, all of the Federal Communications Commission, for appellee.

Before GRONER, Chief Justice, and STEPHENS and MILLER, Associate Justices.

Opinion

MILLER, Associate Justice: The Associated Broadcasters, Inc., appellant in No. 7282, is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. Desiring to assign its radio station license to Columbia Broadcasting System of California, Inc., appellant in No. 7283, Associated joined with Columbia in filing an application with the Federal Communications Commission, seeking the consent of the latter—pursuant to Section 310 (b) of the Communications Act [3]—for the voluntary assignment of its license. The application was heard and denied by the Commission. From its order, effective October 24, 1938, Associated and Columbia filed separate appeals. The Commission moved to dismiss each appeal on the ground that Section 402 (b) gives this court no jurisdiction to entertain them.[4] The motions were argued together and will be considered together.

35 If Columbia had filed an application for a station license, requesting therein the same facilities as are now enjoyed by Station KSFO, denial of the application would, without question, have brought the applicant within the language of Section 402 (b). The practical result of the Commission's contention, then, is that by arranging for an assignment, frankly revealing the arrangement to the Commission, and complying in every possible way with the statutory requirements governing assignments,[5] Columbia has deprived itself of a right of judicial review, which it would clearly have possessed if its application had been an outright request for the facilities of another station. This is not a sensible result and could not have been the intention of the statute.

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[3] 48 Stat. 1086, 47 U. S. C. A. § 310 (b) (Supp. 1938): "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

[4] 48 Stat. 1093, 47 U. S. C. A. § 402 (b) (Supp. 1938): "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

[5] Section 310 (b), supra note 1.

In Pote v. Federal Radio Comm.,[6] a case involving circumstances similar in many respects to those involved in No. 7283, this court decided that a transferee who applied for an assignment of a radio station license had no right of appeal from an order of the Commission denying his application. In No. 7282 the applicant is the transferor and hence the Pote case is clearly distinguishable on that ground. And it is distinguishable, also, from No. 7283 in at least one important respect. In the Pote case the right of appeal was considered in the light of Section 12 of the Radio Act,[7] while here it must be considered in the light of Section 310 (b) of the Communications Act, which contains significant language not contained in Section 12 of the Radio Act, as indicated by italics in the following quotation: "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing."

Whatever may have been the proper interpretation of the old Section 12, and however justified may have been the decision in the Pote case, it is clear that the Communications Act, as now phrased, contemplates an application, a hearing if necessary, and a decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding station license as in the case of an application for a proposed new station license. Moreover, the one application comes just as clearly within the contemplation of Section 402 (b) as the other. It follows that Columbia is an applicant for a radio station license whose application has been refused by the Commission and who, consequently, may appeal to this court under the provisions of Section 402 (b) (1). It follows, further, that Associated is a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this court to determine whether it has been aggrieved, or its interests adversely affected, by the decision of the Commission,
36 refusing the application of Columbia. Whether it may come also within the terms of Section 402 (b) (1) is unnecessary for us to determine. This court has jurisdiction to hear both appeals. The motions to dismiss, therefore, must be denied.

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[6] 67 F. (2d) 509, 62 App. D. C. 303, cert. denied, 290 U. S. 680.
[7] Sections 12 and 16, Act of February 23, 1927, 44 Stat. 1162, 1167, 1169, as amended, 46 Stat. 844.

It is contended that as the Communications Act,[8] which was adopted after the decision in the Pote case, failed to make express provision for appeal from a refusal of an application for transfer of a station license, the rule of statutory construction is applicable, that where a statute is reenacted—after either an administrative or a judicial construction thereof—that fact constitutes evidence of Congressional intent to incorporate such construction into the reenactment. This, however, is not a conclusive presumption. As the Supreme Court has said, one decision construing an act does not approach the dignity of a well-settled interpretation.[9] And it has also said: "A custom of the department, however long continued by successive officers, must yield to the positive language of the statute." [10] In our view—especially because of the language added to the statute as enacted in 1934—the presumption should not be indulged in this case.

To the extent that the decision in the Pote case may be in conflict with these conclusions, it is overruled.

Motions to dismiss denied.

Dissenting opinion

STEPHENS, Associate Justice: I dissent. The existence of a right of appeal is dependent upon Congressional intent. In Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933), this court held that Section 16 of the Act of July 1, 1930, 46 Stat. 844, did not authorize an appeal from the refusal of an application for transfer of a station license. In the Communications Act of 1934, 48 Stat. 1064, 1093, Congress substantially reenacted the provisions for appeals contained in the 1930 statute, except that it added language permitting an appeal from the refusal of an application for a construction permit. I think the law is well settled that reenactment of a statute which has received a judicial construction will be presumed to be an adoption by the legislature of such construction. Latimer v. United States, 223 U. S. 501 (1912); Carroll Electric Co. v. Snelling, 62 F. (2d) 413 (C. C. A. 1st, 1932). Cf. Hecht v. Malley, 265 U. S. 144 (1924); Miller v. Maryland Casualty Co., 40 F. (2d) 463 (C. C. A. 2d,

[8] Act of June 19, 1934, 48 Stat. 1064, 47 U. S. C. A. § 151 et seq. (Supp. 1938).

[9] United States v. Raynor, 302 U. S. 540, 551–552: "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of Krakowski v. United States, 161 Fed. 88, held that the act only prohibited possession of the distinctive paper does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well-settled interpretation."

[10] See Lukens Steel Co. v. Perkins (No. 7368, decided October 3, 1939), — F. (2d) —, — App. D. C. —, and cases there cited. Compare the majority opinion of Mr. Justice Frankfurter with the dissenting opinion of Mr. Justice Roberts in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd. (No. 38, decided November 22, 1939), — U. S. —.

1930); Kales v. Commissioner of Internal Revenue, 101 F. (2d) 35 (C. C. A. 6th, 1939). See 2 Sutherland, Statutory Construction (2d ed. 1904) § 403; 1 Paul & Mertens, Law of Federal Income Taxation (1934) § 3.20.

The statement in United States v. Raynor, 302 U. S. 540 (1938), referred to in the majority opinion, that "One decision construing an act does not approach the dignity of a well-settled interpretation," was made in respect of a single decision by a Federal court of appeals construing a statute which might come for interpretation before other courts of appeals. But where a single construction of a statute is necessarily conclusive, the proposition
37 quoted would not apply. In Seeberger v. Castro, 153 U. S. 32 (1894), certain language in the Tariff Act of 1883 had been construed by the Supreme Court. The same language, embodied in the Tariff Act of 1897, was the subject of interpretation in Latimer v. United States, supra. Concerning the effect of reenactment after the prior construction, the Court in the Latimer case said, speaking through Mr. Justice Lamar:

"The words, having received such a construction under the act of 1883, must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court. * * *" [223 U. S. at 504.]

The United States Court of Appeals for the District of Columbia is the only court, except the Supreme Court, having appellate jurisdiction over the radio orders of the Communications Commission. Pote v. Federal Radio Commission was therefore a conclusive construction of the 1930 act, petition for writ of certiorari having been denied by the Supreme Court (290 U. S. 680 (1933)).

I am aware that the presumption that reenactment of a statute after judicial construction will be deemed a legislative adoption of that construction is not conclusive. The presumption might be said not to arise if the judicial construction appears clearly to be wrong; but I think Pote v. Federal Radio Commission cannot be said to be clearly wrong. And reenactment of particular language after judicial construction thereof would not of course be persuasive that Congress had adopted the judicial construction if amendment of other portions of the statute has altered the meaning of the construed language. But I think that the requirement of Section 310 (b) of the Act of 1934, 48 Stat. 1064, 1086, that there should be no transfer of a station license unless the Commission shall "after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing"—Section 12 of the Radio Act of 1927, 44 Stat. 1162, 1167, having required merely the "consent in

writing of the licensing authority"—is an amendment definitive of the duty of the Commission when passing upon applications for transfers and not one relevant to the right of appeal from a refusal to permit a transfer. And I disagree therefore with the point made by the majority that the change makes the Pote case no longer applicable.

I think the point made in the majority opinion that the Pote case is not controlling as to a transferor is not supportable. While it is true that that case involved a transferee only, the theory of the case was, as I read it, that the statute did not contemplate review of the Commission's refusal to allow a transfer, and this without respect to the question whether the application for transfer was made by the transferee alone or by both the transferor and the transferee. It is of no avail to treat a transferor as, within Section 402 (b) (2), "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application" because, under the view that I take, the phrase "any such application," in its reference to applications, the refusal of which, under Section 402 (b) (1), is appealable, does not include an application for transfer. To treat an application for transfer as an application by the transferor "for modification of an existing radio station license" would strain the quoted words out of their normal meaning. A transferor seeking to divest himself of a license can hardly be said to be one seeking to modify it.

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for reargument

Filed Dec. 16, 1939

Comes now the Federal Communications Commission, appellee in the above-entitled cause, and respectfully moves this Court for a reargument on appellee's Motion to Dismiss this appeal. If this motion is granted, it is further requested that such reargument be permitted before the entire membership of the Court.

FEDERAL COMMUNICATIONS COMMISSION.

By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

39 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement in support of Commission's motion for reargument

Filed Dec. 16, 1939

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

It is respectfully submitted that this Court should grant Appellee's Motion for Reargument for the following reasons:

I. The Court's decision of November 29, 1939, holding that appellant has a standing to take an appeal from the refusal of the Commission to give written consent to the assignment of its license is unsound;

II. There is a sharp conflict in the opinions of the members of this Court who have passed upon the question raised by the Commission's Motion to Dismiss this appeal.

PRELIMINARY STATEMENT

The essential facts in this case are that appellant herein is the licensee of Station KSFO, in San Francisco, California, and that the Commission has refused to give its consent in writing to the assignment of appellant's license to the Columbia Broadcasting System of California, Inc.

The appellant can take an appeal to this Court under Section 402 (b) of the Communications Act of 1934, as amended, from the refusal of the Commission to give its written consent to the proposed assignment of appellant's license only if:

(a) Appellant herein is an applicant for a construction permit for a radio station, or for a radio station license, or for a renewal of an existing radio station license, or for modification of an existing radio station license, whose application has been refused by the Commission; or if

(b) Appellant herein is a person aggrieved or whose interests are adversely affected by a decision of the Commission granting or refusing any such application.

I

40 THE COURT'S DECISION OF NOVEMBER 29, 1939, HOLDING THAT APPELLANT HAS A STANDING TO TAKE AN APPEAL FROM THE REFUSAL OF THE COMMISSION TO GIVE WRITTEN CONSENT TO THE ASSIGNMENT OF ITS LICENSE IS UNSOUND

A. The refusal of the Commission to give its consent in writing to the proposed assignment of appellant's license to Columbia was not an order refusing an application of the appellant within the meaning of Section 402 (b) (1)

A licensee of a radiobroadcast station who is refused Commission consent to assign such license: (1) is not an applicant for a construction permit whose application has been refused, because such person is already a licensee of a radiobroadcast station and is not in any sense requesting a construction permit, the purpose of which is to authorize the construction of a radiobroadcast station; (2) is not an applicant for a radiobroadcast station license whose application has been refused, because such person already has a radio station license and in fact is seeking not to obtain such a license but permission to dispose of such a license; (3) is not an applicant for renewal of existing radio station license whose application has been refused, because a refusal by the Commission to consent to a transfer of license has no relation to or effect upon a renewal of such license; (4) is not an applicant for modification of an existing station license whose application has been refused, because the Commission's refusal to consent to a transfer of license involves no modification of such license. Therefore, appellant has no standing to appeal to this Court under Section 402 (b) (1) of the Act from the refusal of the Commission to give its written consent to the transfer of appellant's license to Columbia.

The only other possible basis for this appeal is that appellant is a person aggrieved or whose interests are adversely affected by an order of the Commission refusing an application for construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, filed by Columbia.

B. The refusal of the Commission to give its consent in writing to the proposed assignment of appellant's license to Columbia was not an order refusing an application of Columbia within the purview of Section 402 (b) (1)

Columbia Broadcasting System of California, Inc., the proposed assignee of appellant's license, is certainly not an applicant

for a construction permit, renewal of an existing radio station license, or for modification of an existing radio station license whose application has been refused by the Commission. It remains only to consider: (1) Is Columbia Broadcasting
41 System of California, Inc., an applicant for radio station license whose application has been refused? And if so, (2) Is appellant herein a person aggrieved or whose interests are adversely affected by such refusal?

In its decision of November 29, 1939, in this case, the Court held that Columbia is an applicant for radio station license whose application was refused by the Commission. The Commission requested a reargument in the appeal taken by Columbia (No. 7283), and in its Statement in Support of its Motion for Reargument in that case has pointed out wherein the Court's decision of November 29, 1939, is in error in holding that Columbia is an applicant for a radio station license whose application was refused by the Commission. The Court is respectfully requested to refer to the argument set forth in said Statement which demonstrates, we believe, that the refusal of the Commission to give its written consent to the assignment of appellant's license to Columbia was not a refusal of an application by Columbia for a radio station license. It is submitted that if this Court was wrong in holding that the action of the Commission complained of in this appeal was not a refusal of an application by Columbia for a radio station license, appellant herein has no possible basis for this appeal. But even if it be assumed that Columbia was an applicant whose application for radio station license was refused, it does not follow that appellant herein was aggrieved, or that its interests were adversely affected by such refusal.

C. Assuming the Commission's refusal to consent to the assignment of appellant's license to Columbia was an order refusing an application by Columbia for a radio station license, appellant is not a person aggrieved, or whose interests are adversely affected by such order within the meaning of Section 402 (b) (2)

In its opinion of November 29, 1939, the Court gave no indication of how it reached the conclusion that appellant herein was a person aggrieved or a person whose interests have been adversely affected by a refusal of Columbia's "application for radio station license." The Court simply said:

"It follows, further, Associated is a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this Court to determine whether it has been aggrieved, or its interests adversely affected by the Decision of the Commission, refusing the application of Columbia."

In the first place, a person does not appeal under the provisions of Section 402 (b) (2) "to determine whether it has been aggrieved, or its interests adversely affected" by a particular order of the Commission. A person cannot take such an appeal unless he is a person aggrieved, or whose interests are adversely affected by such order. The question of whether Associated is such a person as comes within the purview of Section 402 (b) (2)
42 is precisely the question which was raised by the Commission's Motion to Dismiss this appeal. If this question has not yet been decided, then the Commission's Motion to Dismiss has been denied without the threshold jurisdictional question raised by the motion having been decided. It is true that if such a Motion to Dismiss had not been filed it would have been necessary for the Court in the consideration of this appeal on the merits to dispose of the jurisdictional question whether the appellant is a person aggrieved or whose interests are adversely affected within the meaning of Section 402 (b) (2). The purpose of the Commission's Motion to Dismiss was to obtain a determination of this jurisdictional question before the Court considered the case on the merits, because, if the appellant is not a person coming within the purview of Section 402 (b) (2), it has no standing to invoke the jurisdiction of this Court to determine the validity of the action of the Commission complained of, regardless of whether such action is valid or invalid.

Assuming the Court intended to say in its opinion of November 29, 1939, that appellant herein is a person who is aggrieved or whose interests have been adversely affected by the action of the Commission complained of, and as such is entitled under Section 402 (b) (2) to test the validity of the Commission's action in a direct appeal to this Court, it is submitted that no basis in reason or authority to support such a conclusion can be advanced. If the statement in the Court's opinion of November 29, 1939, pertaining to appellant's standing to take this appeal is paraphrased to read: "It follows, further, that Associated is a person, who, under the provisions of Section 402 (b) (2), is aggrieved and whose interests are adversely affected by the decision of the Commission, refusing the application of Columbia," we are left with a bald conclusion with no antecedent reason from which the conclusion follows.

Why should the conclusion that Associated is a person coming within the purview of Section 402 (b) (2) automatically follow from the conclusion that Columbia is an applicant for a radio station license whose application has been refused? The only conceivable theory upon which it can be claimed that appellant is aggrieved or that its interests have been adversely affected by the

Commission's refusal to consent to the proposed assignment of its license, is that appellant has been precluded thereby from carrying out its contractual arrangement with Columbia for the assignment of its license and the lease of its station facilities. It is certainly a novel addition to radio jurisprudence for this Court to
43 hold that one who has a contract with an applicant for a radio station license, the performance of which is dependent upon the granting of such application and which was expressly conditioned upon such application being granted, is a person aggrieved or whose interests have been adversely affected by a refusal of such application. Appellant is in no different position than a prospective landlord, a prospective entertainer, a prospective radio-equipment manufacturer, or any other person whose prospective business dealings with an applicant for a radio station license have been made in expectation of or contingent upon the granting of such license. It is impossible to differeniate between the appellant in this case and any other such person unless appellant, by virtute of its being a licensee under the Act, has some right which is invaded by the action of the Commission which precludes the performance of its contract with Columbia which was conditioned upon the Commission approval of Columbia's "application."

The statute is barren of any suggestion that a licensee of a radiobroadcast station has a right to assign its license or a right to lease its facilities which can be aggrieved or adversely affected by Commission action on "an application for a radio station license" filed by some other person. Any attempt to supply a rationale for the conclusion reached by the Court in its opinion of November 29, 1939, that appellant herein is a person aggrieved by the Commission's refusal to grant Columbia's "application for a radio station license" requires absurd assumptions and leads to ridiculous results. It is respectfully submitted that only by resort to judicial legislation can there be found in the Communications Act of 1934, as amended, any right in an existing licensee to alienate its license or station property which could possibly be the basis for asserting a standing to appeal under Section 402 (b) (2) from an order of the Commission coming within the purview of Section 402 (b) (1).

Conceding for the purposes of this argument that under the Communications Act a licensee of a radio station has a statutory right to assign a station license or any rights thereunder, and a proposed assignee has a right to have such assignment consummated, and that an invasion of such rights by a refusal of the Commission to give its consent in writing to a proposed assignment presents a justiciable controversy, if brought before a court of competent jurisdiction, nevertheless, this Court is not a court of

competent jurisdiction to entertain such controversy in an appeal under Section 402 (b). The remedy in such a case is to in-
44 voke by proper pleadings the jurisdiction of a court authorized by statute to exercise jurisdiction over the controversy. In other words, if the theory of this case is that the appellant as an assignor has a right to assign, and Columbia as an assignee has a right to have the assignment consummated (as distinguished from the theory that an assignee is in substance and effect an applicant for a radio station license and as such has a right which may have been invaded by the Commission's refusal to grant his application, and the assignor's right is as a person interested in the granting or refusing of such application), then it is clear that no appeal can lie under Section 402 (b). It cannot be supposed that if Congress intended to create and protect rights of proposed assignors and proposed assignees as such, it would have left the recognition and protection of such rights to the chance that this Court would realize that there is no difference between a proposed assignee of an existing radio station license and an applicant for a new radio station license, and further recognize that the proposed assignor is a "person aggrieved or whose interests are adversely affected" by a refusal to grant the fictitious application for radio station license. This is particularly true when it is remembered that at the time Congress enacted the Communications Act of 1934 it paid particular attention to Section 402 as well as to Section 16 of the Radio Act of 1927, yet notwithstanding its knowledge of the Pote case, was confident that it had provided a plain and adequate remedy for the vindication of any invasion of the rights of assignor and assignee to an approval of their proposed assignment. The imputed mental processes of the Congress under this theory of the meaning of the Act is novel in the annals of jurisprudence, for it postulates that the Congress in 1934, knowing that this Court had said in 1933 that Section 16 did not offer a remedy for violation (by refusal to consent to a proposed assignment of radio station license) of any rights which the assignor or assignee might have, could see into the future to November 1939 and could foresee the change in the membership of the Court which in 1939 would permit the Court to give effect to the real, albeit somewhat disguised, intention of Congress. We respectfully submit that to make the above assumption with respect to the mental processes of Congress in 1934 is somewhat more difficult than to assume that Congress in enacting Section 402 (b) (1) accepted the interpretation of this Court in the Pote case.

45 For the foregoing reasons, it is respectfully submitted that the Court's decision of November 29, 1938, insofar as it holds that the appellant herein has a standing to invoke the

jurisdiction of this Court under Section 402 (b) (2) is unsound. The Court stated that it was unnecessary to determine whether the appellant herein could invoke the jurisdiction of this Court under Section 402 (b) (1), but as has been shown under point A above it would be impossible to sustain any such contention.

II

THERE IS SHARP CONFLICT IN THE OPINIONS OF THE MEMBERS OF THIS COURT WHO HAVE PASSED UPON THE QUESTION RAISED BY THE COMMISSION'S MOTION TO DISMISS THIS APPEAL

Prior to the Court's decision of November 29, 1939, on the Commission's Motion to Dismiss this appeal, the question raised by the Commission's motion had been considered and passed upon by the Court in the case of Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509, cert. denied, 296 U. S. 680. The Pote case was decided by a Court composed of former Chief Justices Robb, Van Orsdel, and Hitz, and the present Chief Justice Groner. The Court decided that under Section 16 of the Radio Act of 1927, as amended, no appeal to this Court could be taken from a refusal of the Commission to give consent to a transfer of a station license. Mr. Justice Groner dissented in the Pote case. In the decision of November 29, 1939, Chief Justice Groner, adhering to the view expressed in his dissenting opinion in the Pote case, and Associate Justice Miller held that
46 under Section 402 (b) of the Communications Act of 1934, as amended, an appeal to this Court could be taken from such a refusal, and overruled the Pote case. Associate Justice Stephens dissented. The language contained in Section 16 of the Radio Act of 1927, as amended, and the language contained in Section 402 (b) of the Communications Act of 1934, as amended, is precisely the same in regard to appeals from a refusal by the Commission to give consent to the transfer of a station license. Both statutes are silent on the subject.

Of the seven members of the Court who have considered and passed upon the question raised by the Commission's Motion to Dismiss this appeal, five, namely, former Chief Justice Martin and former Associate Justices Robb, Van Orsdale, and Hitz and Associate Justice Stephens, have held to the view that no appeal to this Court lies from a refusal by the Commission to give its written consent to a transfer of radio station license. Only two members of this Court, namely, Chief Justice Groner and Associate Justice Miller, have ever advanced the view that such an appeal may be taken. Three members of this Court, namely, Associate Justice Edgerton, Vinson,[11] and Rutledge, have not directly passed

[11] Associate Justice Vinson concurred in the opinion of Groner, C. J., in the case of The Crosley Corporation v. Federal Communications Commission, decided June 26, 1939, in which the Pote case was cited with approval.

upon the question raised by the Commission's Motion to Dismiss. In view of the difference in views of the judges now composing the Court, as well as the difference in views of some of the judges now composing the Court, and those formerly composing the Court, the question of law presented by the filing of an appeal from an action of the Commission granting or refusing consent to transfer of radio station license, as well as from action of the Commission granting or refusing consent to the transfer of control of a licensee corporation [12] is shrouded in
47 doubt. In the present state of the law it is impossible to know with any degree of certainty whether an appeal to this Court will lie from action of the Commission in such cases because a determination of that question may vary, depending upon the views of the two Associate Justices who are selected to sit with the Chief Justice in the case. If reargument of the instant case is permitted before the entire membership of the Court, the question raised by the Commission's Motion to Dismiss in all pending appeals involving this same jurisdictional question can be finally determined in a manner which will remove the doubt as to the state of the law because of the patent differences in views of the judges of this Court who have expressed themselves on the subject.

The Commission is not unmindful that the statute creating this Court provides that it shall consist of one Chief Justice and two Associate Justices, and that the Chief Justice and any two Associate Justices may hear and decide any appeal from a decision of the Commission. We recognize also that insofar as the instant motion is concerned, a determination of whether reargument shall be permitted and, if so, whether such reargument shall be before the Chief Justice and the two Associate Justices who originally heard the case or before the entire membership of the Court, lies in the sound discretion of the Court. We respectfully suggest, however, that this Court on many occasions has convened as a five-judge Court. Indeed, the Pote case was decided by a five-judge Court. It is submitted that because the jurisdictional question here involved has been twice decided by a divided Court, a different result being reached on each occasion, and because the views expressed by the justices of this Court on the question are irreconcilable, this is a case in which it is most appropriate for the Court by its entire membership to hear and authoritatively and finally determine the question.

48 Wherefore, appellees respectfully request this Court to permit a reargument on its Motion to Dismiss the instant

[12] Section 310 (b) applies to transfer of control of licensee corporations as well as to assignment of station licenses.

appeal and further pray, that such reargument be heard by the entire membership of the Court.

Respectfully submitted,

FEDERAL COMMUNICATIONS COMMISSION,

By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

(Signed) WILLIAM C. KOPLOVITZ
William C. Koplovitz,
Assistant General Counsel.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Dempsey, being first duly sworn, deposes and says that he is General Counsel of the Federal Communications Commission herein; that he has today forwarded by registered mail, postpaid to Stuart Sprague, Attorney for The Associated Broadcasters, Inc., 117 Liberty Street, New York, New York, a true and correct copy of the attached motion for reargument and statement in support thereof.

(Signed) WILLIAM J. DEMPSEY,
William J. Dempsey.

Subscribed and sworn to before me this 16th day of December 1939.

[SEAL]

STEPHEN TUHY, Jr.,
Stephen Tuhy, Jr.,
Notary Public.

My Commission expires Oct. 14, 1943.

49 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order denying motion for reargument

January 2, 1940

On consideration of the Commission's motion for reargument, it is ordered by the Court that the motion be, and it is hereby, denied.

50 In United States Court of Appeals for the District of Columbia

[Title omitted.]

(File endorsement omitted.)

Motion to suspend further proceedings pending Supreme Court action on appellee's proposed petition for writ of certiorari

Filed January 10, 1940

Comes now the Federal Communications Commission, appellee in the above-entitled cause, and moves this Honorable Court to suspend all further proceedings on this appeal for thirty days, pending final disposition by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari for review of this Court's judgment denying the Commission's motion to dismiss the instant appeal, and in support of this motion points out the following:

1. On November 29, 1939, the Commission's motion to dismiss this appeal was denied by this Court.

2. On January 2, 1940, the Commission's motion for reargument of said motion to dismiss was denied by this Court.

3. In view of the importance of the jurisdictional question involved in this appeal, the Commission proposes to file forthwith in the Supreme Court of the United States a petition for writ of certiorari to review the judgment of this Court denying the Commission's motion to dismiss this appeal.

4. Said proposed petition is now in the process of preparation and will be filed at the earliest possible date.

5. If the Supreme Court grants said petition and reverses the aforesaid judgment of this Court, a consideration by this Court of the merits of this appeal while such petition and review are pending, as well as the procedural steps required on behalf of the parties in connection with the filing of the record and briefs, and oral argument, will obviously have been rendered unnecessary and there will have occurred a needless expenditure of time and money by the Court and the parties.

51 Wherefore, it is respectfully requested that this Court suspend all further proceedings on this appeal for thirty days pending final determination by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari to review the aforesaid judgment of this Court denying the Commission's motion to dismiss this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
(Signed) WILLIAM C. KOPLOVITZ,
William C. Koplovitz,
Assistant General Counsel.
B. P. COTTONE,
Benedict P. Cottone,
Counsel.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Dempsey, being first duly sworn, deposes and says that he is General Counsel of the Federal Communications Commission herein; that he has today forwarded by registered mail, postpaid, to E. Stuart Sprague, Attorney for The Associated Broadcasters, Inc., 117 Liberty Street, New York, New York, a true and correct copy of the attached "Motion to Suspend Further Proceedings Pending Supreme Court Action on Appellee's Proposed Petition for Writ of Certiorari."

WILLIAM J. DEMPSEY.

Subscribed and sworn to before me this 9th day of January 1940.

STEPHEN TUHY, JR.,
Notary Public.

52 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order suspending further proceedings

Filed January 27, 1940

On consideration of appellee's motion filed herein on January 10, 1940, and it appearing that appellee proposes to file in the Supreme Court a petition for writ of certiorari in this cause,

It is ordered that further proceedings in this cause be, and they are hereby, suspended for thirty days from January 10, 1940.

Dated January 27, 1940.

Per Curiam.

A true Copy,
Test:

[SEAL] JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

53 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Designation of record

Filed Feb. 20, 1940

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. Appellant's Notice of Appeal and Statement of Reasons Therefor filed on November 12, 1938.

2. Commission's Statement of Facts, Grounds for Decision, and Order filed December 12, 1938.

3. Commission's Motion to Dismiss filed December 14, 1938.

4. Appellant's Opposition to Motion to Dismiss filed December 17, 1938.

5. Commission's Reply to Appellant's Opposition to Motion to Dismiss filed December 19, 1938.

6. Docket entry of February 4, 1939, assigning Motion to Dismiss for argument on March calendar.

7. Minute entry of February 20, 1939, setting Motion to Dismiss for argument on March 7, 1939.

8. This Court's opinion in the above-entitled cause denying Commission's Motion to Dismiss rendered November 29, 1939.

9. Commission's Motion for Reargument filed December 16, 1939.

54 10. Minute entry of January 2, 1940, denying Commission's Motion for Reargument.

11. Commission's Motion to Suspend Further Proceedings Pending Supreme Court Action filed on January 9, 1940.

12. Order of Court suspending further proceedings for 30 days from January 10, 1940, filed on January 27, 1940.

13. This designation.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

Service of copy of Designation of Record acknowledged this 21st day of February 1940.

E. STUART SPRAGUE,
Counsel for The Associated Broadcasters, Inc. (KSFO).

55 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

240114—40

U. S. GOVERNMENT PRINTING OFFICE: 1940